IN THE

Supreme Court of the United States

..... TERM, A. D. 1940.

No. 643

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A NEBRASKA CORPORATION,
Petitioner,

vs.

ANTONIA P. MICCOLIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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SUBJECT INDEX.

TABLE OF CASES AND STATUTES.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Mutual Benefit Health & Accident Association, a corporation organized under the laws of the State of Nebraska, respectfully represents:

Matter Involved.

This action was removed to the District Court of the United States for the Northern District of Indiana and was prosecuted to recover upon a policy of accident insurance on the assessment plan, issued by petitioner on December 10, 1931 to one Paul Miccolis, who was assassinated on March 29, 1934.

Respondent was the beneficiary named in said policy. The case was tried before a jury, resulting in a verdict and judgment for respondent for $5,000.00, the face of the policy, plus interest. Petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, and opinion and judgment was rendered by said Court on October 28, 1940, affirming the judgment of the District Court. Petitioner's Petition for Rehearing was overruled by the Circuit Court of Appeals on November 20, 1940.

The policy (printed in Appendix) was issued upon a written application, a copy of which was attached to and made a part of it. Petitioner-defendant interposed defenses on the ground that in the written application assured made false statements concerning prior accident insurance, in that he concealed the existence of an accident insurance policy issued to him by the Federal Life Insurance Company in January, 1931, and cancelled by it in November, 1931, and further concealed the payment of benefits to him under said policy in March, 1931. He further misrepresented his true occupation, stating the same to be that of the proprietor of a grocery store with office duties only, whereas he was active as a member of a ring engaged in illicit liquor traffic, in which his sales of sugar and yeast for a given period amounted to more than ten times the legitimate sales of his grocery store. He was prosecuted by the United States and by the State of Indiana, and convicted and punished for conspiracy and other violations of the National Prohibition Laws. These defenses were proved without dispute. There was also evidence that petitioner-defendant had re-tendered premiums upon discovery of the falsity of the statements in the application. This evidence was disputed.

A particular point was made in the trial court and upon appeal to the Circuit Court of Appeals of the refusal of the District Judge to give an instruction tendered by the defendant, your petitioner, as follows (R. 198-203):

"Instruction No. 6.

> If you find from the evidence that the defendant tendered the return of the premiums with lawful interest within a reasonable time after discovering the facts on which it denies liability, or if you find that such tender was not made, but that if it had been made it would have been unavailing because the plaintiff refused to accept anything less than Five Thousand ($5,000.00) Dollars, then your verdict should be for the defendant."

The District Judge modified this instruction by striking out the words "then your verdict should be for the defendant" and substituted the words "she cannot now be heard to complain of the nature of or failure of the tender." (R. 198.)

The respondent-plaintiff requested the District Judge to instruct the jury that all defenses against the policy were foreclosed by the Indiana statute forbidding the contest of a life insurance policy after it has been in force for two years from its date. The District Court refused so to charge, but charged that the policy was one of accident insurance and not governed by the life insurance statute.

The Circuit Court of Appeals differed with the District Court in this respect, and held that the policy was, so far as death benefits were concerned, one of life insurance and governed by the incontestability provisions of the life insurance statute of Indiana. (R. 235) It therefore affirmed the judgment without considerating the merits of the appeal, which hinged upon the refusal of the instruction as tendered, and the refusal to enter judgment for petitioner notwithstanding the verdict.

Basis of Jurisdiction.

This Honorable Court has jurisdiction to grant the Writ prayed for under Section 240(a) Judicial Code (U. S. C. C. 347).

Questions Presented.

1. Whether Clause 3, Sec. 5, Ind. Acts 1909, Chap. 95 (Burns' R. S. '33, Old Vol. 8, § 39-801), requiring that a life insurance policy shall provide for its incontestability after it shall have been in force during the lifetime of the insured for two years from its date, shall be applied to a policy of accident insurance, issued on the assessment plan, carrying both disability and death benefits.

2. Whether, in view of the undisputed false representations in the application, the District Court should have submitted to the jury by instruction No. 6, tendered, only the question of fact whether the premiums were tendered back to beneficiary, or, if not, whether the evidence showed that tender would have been futile, and therefore was excused.

Reasons Relied Upon for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, particularly in that it has attempted to apply the incontestability provision of the life insurance statute of Indiana to a policy of accident insurance issued by an assessment company, which decision is in direct conflict with *Western Life Indemnity Co.* v. *Bartlett,* 84 Ind. App. 589 (1924); (transfer denied by Supreme Court).

2. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeal on the same question.

3. The Circuit Court of Appeals erroneously refused to review the action of the District Court in refusing to limit the jury to inquiry as to whether tender of premium was made by petitioner before suit, or whether tender was excused because it would have been futile. This was presented by Petitioner's Instruction No. 6.

Your petitioner believes the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress and the rules of this Honorable Court in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Antonia P. Miccolis *vs.* Mutual Benefit Health & Accident Association, a Nebraska corporation, No. 7279", to the end that said cause may be reviewed and determined by this Court as provided in Judicial Code § 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem appropriate and in conformity with the said Act, and that the said judgment of the United States Circuit Court of Appeals and the District Court may be reversed by this Honorable Court, and the case be remanded for further proceedings.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a Nebraska corporation,
Petitioner,

By L. L. Bomberger

John H. Marthland

Its Attorneys.

SUPPORTING BRIEF.

Opinion of Court Below.

Is in the Record, page 232 It has not yet been published.

Jurisdiction.

See Petition.

Statement of the Case.

Petition, pages 1-3.

Questions Presented.

Petition, page 4.

Assigned Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the accident insurance policy involved herein, issued on the assessment plan, is governed by Clause 3 of Sec. 39-801 Burns 1933 Old Vol. 8, which makes a policy of life insurance incontestable after it shall have been in force during the lifetime of the insured for two years after its date.

2. The District Court erred in refusing to give the jury petitioner's tendered instruction No. 6, as tendered, but modified the same so as to render it meaningless.

SUMMARY OF ARGUMENT.

Point A.

The Circuit Court of Appeals erroneously decided a question of local law and contravened local decision by applying to the policy in question the provision of the Act of 1899 (Burns' R. S. Old Vol. 8, Sec. 39-801, Chap. 3), requiring in life policies an incontestable clause (among thirteen standard requirements). Petitioner was a company engaged in the business of accident insurance upon the assessment plan, which was governed exclusively by the Act of 1897 (Burns' R. S. Old Vol. 8, Sec. 39-430).

Point B.

Other Courts of Appeal have construed similar statutes contrary to the decision herein of the Seventh Circuit.

Point C.

The evidence was undisputed that insured concealed in his application the payment of benefits under a previous accident insurance policy and the cancellation of such policy.

There being a dispute in the evidence on the question of tender of premiums to beneficiary-respondent, the District Court should have submitted petitioner's Instruction No. 6, to the effect that if they found that tender was made, or if not made, would have been futile, the verdict should be for defendant.

ARGUMENT.

Point A.

In *Western Life Indemnity Co.* v. *Bartlett*, 84 Ind. App. 589 (1924), the Appellate Court of Indiana decided that Clause 6 of the standard provisions section (printed in Appendix) (Act of 1899 as amended in 1909, Burns R. S. Old Vol. 8, Sec. 39-801) did not apply to policies of life insurance companies doing business on the assessment plan. The Court said (607):

> "While the policy sued on provides for a fixed monthly premium, it also provides that if the premium so fixed is not sufficient to meet the requirements of the policy, the company reserved the right, in compliance with the law, to call for the difference necessary to meet such requirements and to fix the time for the payment thereof. This clearly indicates that the policy was issued by a company doing business on the assessment plan. See § 8989 Burns 1926, [39-426, R. S. 1933, Old. Vol. 8] § 4744 Burns 1914, Acts 1897, p. 322, § 6. Section 9036, *supra*, is not applicable to a company doing business on the assessment plan. See, also § 8950 Burns 1926 [39-235, R. S. 1933, Old Vol. 8] § 4706 Burns 1914, Acts 1899, p. 30, § 29, as amended by Acts 1909, p. 251, § 4."

The Supreme Court of Indiana refused to transfer this case.

The decision of the Appellate Court was supported not only by Sec. 29, Acts 1899, Burns' Old Vol. 8, Sec. 39-235, but by Sec. 10 of the amending act of 1909, which is Burns' Old Vol. 8, Sec. 39-806, reading:

> "This act shall not apply to annuity or industrial policies or to corporations or associations operating on the assessment or fraternal plan."

It was also supported by the apparent legislative intent to distinguish between accident policies with death in-

demnities and policies of life insurance, for in the Act of 1897, Chap. 195, p. 318, there are contained two sections which set up the difference.

Section 6 of this Act (Burns R. S. Old Vol. 8, Sec. 39-426) defines in detail what shall constitute the business of life insurance upon the assessment plan. *Section* 7 (39-427) prescribes a method of setting up a reserve fund by such companies. *Section* 10 (39-430) of the same Act prescribes the qualifications for doing the business of accident insurance upon the assessment plan. *Section* 11 (39-431) prescribes the method by which such companies shall set up reserve.

If an assessment life policy is expressly excluded from the Standard Provisions Act, certainly an assessment accident policy cannot be brought under the statute by implication.

Furthermore, *Section* 1 of the amendment (Burns R. S. Old Vol. 8, Sec. 39-201) enlarged the original Section 1 above mentioned to permit the making of insurance upon the lives of individuals and every insurance appertaining thereto and connected therewith, adding these words:

> "* * * including insurance against permanent mental or physical disability resulting from accident or disease, or against accidental death, *combined* with a policy of life insurance, * * *"

thus permitting for the first time the combination in or with a life policy of additional coverage against accident. The fact that the two might be combined as stated in the statute is of significance, particularly so, since Section 1, Acts 1899, amended 1909, is in the same act as the standard provisions section.

That the policy in question is that of an assessment association doing an accident business is clearly disclosed by ite terms, to-wit:

> "INSURING CLAUSE. Mutual Benefit Health and Accident Association, Omaha, * * * does hereby insure

Paul Miccolis * * * of the City of Gary, State of Indiana, against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely accidental means." (Appendix, pp. 21 and 22.)

* * * * *

"(c) The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of Twenty-seven ($27.00) Dollars as first payment; and the payment in advance of premiums of Seventeen ($17.00) Dollars quarterly or Sixty-eight ($68.00) Dollars annually thereafter, beginning with April 1, 1932, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. * * *

The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for the difference as required." (Appendix, pp. 28 and 29.)

A-1.

The Circuit Court of Appeals in its opinion cites three Indiana cases which we shall discuss briefly. The first is *State* v. *Willett*, 171 Ind. 296 (1908). This decision turned upon the construction of a criminal statute (Burns 1908, Sec. 4713, Acts 1901, p. 374), which, in substance, made it an offense to write a policy of insurance upon the life of an individual

> "unless the beneficiary named in such policy shall have a bona fide insurable interest, in whole or in part, in the life of such insured, * * * and unless the person so insured shall have first passed a satisfactory medical examination." (374.)

An organization known as the Greenfield Mutual Burial Association issued a certificate or policy naming C. W. Morrison & Son "the official undertakers of this association" as beneficiary. The Court held that the issuance of such certificate was in effect a policy on the life of

the named member and that the beneficiaries having no insurable interest, the statute had been violated. The question here raised was not involved.

The next case cited by the Circuit Court of Appeals is *Natl. Colored Aid Society* v. *State,* 208 Ind. 380 (1935). The question decided in this case was whether the portion of Burns' R. S. Old Vol. 8, Sec. 39-426, which is as follows:

> "* * * nothing herein contained shall be construed as applicable to any association of religious or secret societies, or to any class of * * * soldiers, formed for the mutual benefit of the members thereof and their families exclusively, or to any secret or fraternal societies, lodges or councils that may be organized, or that are now organized and doing business in this state, which conduct their business and secure members on the lodge system exclusively, having ritualistic work and ceremonies in their societies, lodges or councils, and which are under the supervision of the grand or supreme body, nor to any association organized solely for benevolent purposes and not for profit * * *"

applied to a burial society. The Court held it did not. The question therein raised is in no way involved in the case at bar.

The case of *Guardian Life Insurance Co.* v. *Barry,* 213 Ind. 56, 61 (1937) is the decision most relied upon by the Circuit Court of Appeals to sustain its decision. The question decided in the *Barry* case was whether or not the incontestable provision for life policies required by Burns' R. S. Old Vol. 8, Sec. 39-801 cl. 3 applied to a *rider insuring against disability* attached to a policy of life insurance, which policy of life insurance was admittedly governed by the incontestable provision. The Court held that the incontestable provision of the statute did not apply to the insurance against disability. The policy and the rider each called for its own separate premium. (Op. p. 60.) The life policy could be carried for a stated sum and the indemnity rider abandoned. It is common knowledge, we

take it, that health and accident indemnity riders on life policies are limited as to time and terminate when the insured reaches a stated age, although the life coverage continues to death if the life premium is paid. In the instant case, there was one stated premium for all coverage, subject only to additional *assessments* to cover the one designated risk that is, accident, whether the result was disability or death.

Moreover, the policy could never come within the protection of the incontestability statute because it expressly provides that the acceptance of any premiums shall be optional with the association. By the exercise of this option the association could end any policy at any time, regardless of the years it had been in force. But the Circuit Court of Appeals applies a two-year incontestable clause to what may be, at the option of the insurer, a one-year policy.

Nothing in the *Barry* case supports the holding of the Court of Appeals that a policy insuring against accident for a stated premium may be divided into two policies, one accident and the other life, nor, much less, that the division takes place when the result of the accident has been determined. Neither is there anything in the decision that can be construed to apply the standard provisions to a policy issued on the assessment plan.

In its opinion the Circuit Court of Appeals says (Op. p. 4, R. 235):

> "In passing, however, it may be observed, as to the 1935 amendment, that it recognizes the law of Indiana to be as stated in the Barry case."

In connection with this observation by the Court, it is to be remembered that the legislature, in passing the Act of 1935, provided for different standard provisions in policies against death by accident and life insurance policies. The standard provisions for a policy of life insurance are found in Burns R. S. 1933, New Vol. 8, Sec. 39-4206, while

the standard provisions for policies against accidental death are contained in Burns R. S. 1933, New Vol. 8, Sec. 39-4306. It is respectfully submitted that in thus distinguishing between a policy of life insurance and a policy against accidental death, the legislature, instead of recognizing the law to be as in the *Barry* case, was carrying on the historic legislative policy of the State of Indiana.

But if the Act of 1935 is to be our guide, it clearly shows the untenable position taken by the Circuit Court of Appeals. In this Act there are standard provisions for health and accident policies. (Burns R. S. New Vol. 8, Sec. 39-4306.) Excerpts from this section are printed in the appendix hereto. Attention is called to the opening sentence of this section:

> "On and after the first day of July, 1935, no policy of insurance against loss or damage from sickness, or the bodily injury or death of the insured by accident, shall be issued * * *" etc.

Standard provision requirements are set out, among them being

> "(A): 11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.
>
> * * * * * *
>
> 16. The insurer may cancel this policy at any time by written notice delivered to the insured" etc.

The Act also contains the standard provisions requirements of life insurance policies. (Sec. 39-4206.) This contains, among other things, a two-year incontestability provision. Obviously the two standard provisions requirements are inconsistent and not applicable to the same policy. But the Circuit Court of Appeals holds in effect that the standard provisions of life policies are to be applied to accident policies with death benefits. The Court would certainly not eliminate the standard provisions requirements of accident policies. So in effect, it sets up by judicial construction two

sets of standard provisions for accident policies but then only in the event that death indemnity is claimed under such policy.

POINT B.

But if it did not appear that the Circuit Court of Appeals has rendered a decision contrary to the controlling Indiana authority, it conflicts with the holdings of other Circuit Courts of Appeal. In the interest of uniformity, the attention of the Court is respectfully called to some of these decisions. In doing so it is recognized that some Circuit Courts of Appeal have construed general statutes relating to policies of life insurance to apply to both life and accident policies, where death resulted. But we believe that in all such cases they have been required to do so by reason of the decision of the highest court of the state to that effect.

See *Continental Casualty Co.* v. *Agee*, 3 Fed. (2d) 978, (1924), in which Your Honors set aside an order granting certiorari to the Eighth Circuit after the Supreme Court of Utah decided the question. 269 U. S. 551.

Therefore, as the matter is open from that standpoint, it is submitted that there is a conflict between the instant case and decisions of other Courts of Appeal.

In *United Comml. Trav.* v. *Edwards*, (10 C. C. A.) 51 Fed. (2d) 187, (1931), the Court considered the statute of Oklahoma requiring life policies to carry a copy of the application. The contest was over a certificate in a benefit society. Referring to the section relied upon by the plaintiff, the Court said (p. 190):

> "• • • A mere reading of all of section 6731 demonstrates, beyond peradventure of doubt, that it deals only with life insurance policies, and has nothing to do with accident insurance. The first sentence of the section reads 'No policy of life insurance shall be issued,' etc. The sections preceding and following deal exclusively with life insurance. But still more convinc-

ing is the section itself. It requires that all life insurance policies shall provide in substance (among other things) that if the age of the insured has been misstated, the policy or the premium shall be adjusted to correspond; that the policy shall participate in the surplus of the company, and for the manner of paying dividends to the policyholder; that after three premiums have been paid, there shall be a specified loan value; that in case of default in payment of premiums after three years, the insured shall be entitled to the reserve on the policy in certain optional forms. There are other provisions, but these are sufficient to demonstrate that the section can have no possible application to accident policies, the premiums on which are not graduated by the age of the insured, which do not participate in the surplus of the company, which pay no dividends, which have no reserve values, and which afford the insured no unqualified right to keep the policy in force by the payment of premiums."

he statute of Oklahoma thus construed by the Tenth Cirit is practically identical with the Indiana Standard Prosions Act. (Burns' R. S. Old Vol. 8, § 39-801.)

In *Fidelity & Cas. Co.* v. *Dorough*, 107 Fed. 389 (1901), e 5th C. C. A., in holding that a Texas statute imposing a enalty for delay in settling a claim under a life or health olicy did not apply to an accident policy, said:

"* * * Outside of the defining statute quoted, it is common knowledge that the one insures against the inevitable, with the intent that eventually the amount of the policy shall be paid to the beneficiary; the other insures against the accidental, with the intent that the liability of the insurance company to pay the amount or amounts stipulated shall attach only on the occurrence of bodily injuries to the insured, sustained through external, violent, and accidental causes. The distinction between accident insurance and health insurance is equally clear. Accidental injury may happen; sickness and infirm health may be considered as inevitable. In the one the amount of indemnity stipulated may never become due; in the other, if the policy is kept in force the indemnity stipulated is certain to become due."

In *Mutual Reserve Life* v. *Dobler,* 137 Fed. 550, (1905) the 9th C. C. A. held that failure to disclose existing *accident* insurance in an application for *life* insurance was not an irregularity because:

> "* * * In the ordinary understanding and usage there is a well-defined distinction between life insurance and accident insurance. In the latter the contract is to pay a fixed sum in case of death resulting from external, violent, and accidental means, and ordinarily for the payment of a fixed sum periodically during incapacity caused by accidental injury. The policy covers a short period of time, ordinarily not longer than a year. * * *"

In *Standard Life & Accident Ins. Co.* v. *Carroll,* 86 Fed. 567 (1898), the Third Circuit Court of Appeals decided that the Pennsylvania Act requiring copies of the application to be attached to the policy, or that otherwise contest by insurer would not be permitted, did not apply to an accident policy, although it expressly named all life and fire insurance policies upon lives or property. The Court said (569):

> "* * * Presumably, the legislature intended to exclude from the operation of the act the classes of insurance policies not named. The suggestion that the act includes policies of insurance against bodily accident seems to us to be quite inadmissible. The instrument sued on here is strictly an accident insurance policy. The form of the policy is that commonly used in insurance against bodily accidents. The primary purpose is to secure a weekly indemnity in money to the insured in the event of his disability from accidental injury. In certain specified contingencies, resulting from accidental injury, a specified gross sum is to be paid. In some of these resulting contingencies the stipulated specific payment is a proportionate part of the principal sum named in the policy, and in other contingencies the whole principal sum is to be paid. One of the latter is death resulting from the accident within 90 days thereafter. But this contingent provision does not make the instrument a life insurance policy, either in a popular or in a legal sense. * * *"

Flannagan v. *Provident Life & Accident Ins. Co.,* 22 Fed.

(2) 136 (1927), indicates that the Fourth Circuit Court of Appeals is like-minded with the Third, Fifth, Ninth and Tenth. While the Court puts its decision upon the ground that there was no coverage of the accident sustained by the insured, it nevertheless said that the Virginia statute preventing contestability of a life policy for any cause after one year from the date thereof, applied only to life insurance policies and not to accident insurance, even though the coverage was death by accident.

Point C.

After the death of the insured, petitioner made an investigation which disclosed the issuance and cancellation of another accident policy and payment of benefits thereunder (R. 59), all of which was concealed in the application. The questions and answers in the application are (R. 221):

> "9. Has any application ever made by you for life, accident or health insurance been declined?
>
> Answer as to each. No.
>
> Has any life, health or accident policy issued to you been cancelled? Answer as to each. No.
>
> Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each. No. If so, give full particulars. No.
>
> 10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes. No."

There is no denial that these answers were false. Insured was killed on March 29, 1934. On May 6th petitioner's agent interviewed respondent-beneficiary at her home. There is dispute as to just what was said between them, but there is evidence that he wrote a draft for return of premium and interest, and tendered it to her (R. 109-110). The evidence is undisputed that respondent steadfastly refused to accept anything except the face of the policy (R.

159-162-163). There is also disputed evidence that again the following August the draft was re-tendered plus $100.00, which was again refused by respondent (R. 175).

From these facts, whether undenied or disputed, the jury had a right to find that a tender was made if it believed petitioner's witness. It also had the right to find that the attitude of respondent was such that even if no tender were made, it would have been futile had it been made. So that whether the tender was made, or would have been futile, the concealment of prior insurance benefits and cancellations was sufficient to void the policy.

Petitioner-defendant, acting upon the theory that the evidence of fraud being undisputed, therefore the only question for the jury was tender of premium, tendered instruction No. 6 (R. 203) which permitted the jury to find the facts as to tender either way, but attempted to guide them in reaching a result. It said that if a tender were made and refused, or in the alternative, if it were not made but it would have been futile had it been made, the defendant was entitled to a verdict. The District Court, however, had a different idea about the effect of these findings and struck out the words

> "then your verdict should be for the defendant"

and concluded the instruction by saying

> "plaintiff cannot now be heard to complain of the nature of or failure of the tender" (R. 198).

By so changing the instruction, the Court completely destroyed its effect.

There was but one issue to submit to the jury and that involved the question of tender. If it was made and refused, that ended it. If it was not made, then petitioner-defendant had evidence from which the jury could find that had it been made, it would have been futile, which futility excuses a tender in Indiana.

Blair v. *Hamilton* (1874) 48 Ind. 32; 35.
Lahr v. *Broyles* (1927) 86 Ind. App. 33; 37.

Petitioner was thus deprived of an instruction upon the theory that the only question to be submitted to the jury was that of tender. The District Court devitalized the instruction. It was without point or value as modified. This is an error of the District Court which patently was committed, and which the Circuit Court of Appeals, by its attitude on the incontestability question, refused to consider.

It is therefore respectfully submitted that certiorari should be granted and that upon further consideration of the case, this Honorable Court should reverse the judgment of both the Circuit Court of Appeals and the District Court.

L. L. Bomberger

John H. Northland

Attorneys for Petitioner.

APPENDIX.

This Policy Provides Benefits for Loss of Life, Limb, Sight or Time by Accidental Means, or Loss of Time by Sickness as Herein Provided.

(Cut)

No. .....

IN THE

MUTUAL (Cut) BENEFIT
HEALTH AND ACCIDENT
ASSOCIATION
Omaha

Issued To

.....

Dated

.....

Policy Form 68V

Business Men's Special Non-Prorating Policy.

This Policy Provides Benefits for Loss of Life, Limb, Sight or Time by Accidental Means, or Loss of Time by Sickness as Herein Provided.

MUTUAL (Cut) BENEFIT
HEALTH AND ACCIDENT
ASSOCIATION
Omaha

Monthly Benefits	$200.00	Death Benefit	$5,000
Maximum Monthly Benefits	$400.00	Maximum Death Benefit	$10,000

(Herein called Association)

Does Hereby Insure

Insuring Clause

Paul Miccolis (Herein called the Insured) of City of Gary, State of Indiana, against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Ac-

cidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accidental Indemnities.

Part A.

Specific Losses.

If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For Loss of Life	$5,000.00
And in addition, $200 a month for that part of the period between the date of accident and the date of death.	
For Loss of Both Eyes	5,000.00
For Loss of Both Hands	5,000.00
For Loss of Both Feet	5,000.00
For Loss of One Hand and One Foot	5,000.00
For Loss of Either Hand	1,500.00
For Loss of Either Foot	1,500.00
For Loss of Either Eye	1,500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

Part B.

Double Specific Losses.

If the Insured sustains injuries as described in the Insuring Clause, while riding as a fare paying passenger, within the enclosed part of any railway or street railway passenger car or bus, operated on a regular schedule between designated stations, provided by a common carrier for passenger service only, caused by the wrecking of

the conveyance, and such injuries independently and exclusively of disease and all other causes shall continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks from the date of the accident, the Association will pay in lieu of all other indemnity:

For Loss of Life	$10,000.00
And in addition, $400 a month for that part of the period between the date of accident and the date of death.	
For Loss of Both Eyes	10,000.00
For Loss of Both Hands	10,000.00
For Loss of Both Feet	10,000.00
For Loss of One Hand and One Foot	10,000.00
For Loss of Either Hand	3,000.00
For Loss of Either Foot	3,000.00
For Loss of Either Eye	3,000.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

Part C.

Total Accident Disability Two Hundred Dollars Per Month for Life.

If such injuries as described in the Insuring Clause, do not result in any of the above mentioned specific losses but shall wholly and continuously disable the Insured for one day or more, the Association will pay a monthly indemnity at the rate of One Hundred ($100.00) Dollars per month for the first fifteen days and at the rate of Two Hundred ($200.00) Dollars per month thereafter so long as the Insured lives and suffers said total loss of time.

(Seal)

Series 340.

Part D.

Partial Accident Disability Eighty Dollars Per Month.

If such injuries, as described in the Insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, the Association will pay for the period of such partial loss of time, but not exceeding three consecutive months, a monthly indemnity of Eighty ($80.00) Dollars.

Part E.

Double Indemnity Four Hundred Dollars Per Month for Life.

If the Insured sustains injuries while riding as a passenger, within the enclosed part of any railway or street railway passenger car or bus, provided by a common carrier for passenger service only, caused by the wrecking of the conveyance, the Association will pay double the amount of monthly indemnity the Insured would otherwise receive.

Part F.

Full Indemnities for Septic Infection.

If accidental bodily injuries covered by this policy result in septic infection or blood poisoning, the disability or loss consequent thereon shall be deemed due to accident, and indemnities therefor in full as provided by this policy will be paid for loss of life, limb, sight or time.

Part G.

Medical Attendance Fifty Dollars.

If such injuries require immediate medical or surgical treatment by a physician, surgeon or osteopath, and Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, not exceeding Fifty ($50.00) Dollars.

Part H.

Financial Aid Two Hundred Dollars.

If such injuries render the Insured physically unable to communicate with friends, the Association will, upon receipt of a message giving this Policy number, immediately transmit to the relatives or friends of the Insured

any information respecting him, and will defray all expenses necessary to put the Insured in communication with, and in the care of friends, provided such expense shall not exceed the sum of Two Hundred ($200.00) Dollars. This benefit to be in addition to any other benefits.

Part I.

Air Travel Coverage.

This policy covers injuries caused by any of the hazards of aviation while the Insured is riding as a fare paying passenger in a licensed passenger airplane provided by an incorporated common carrier of passengers and while operated by a licensed transport pilot upon a regular passenger route between definitely established airports.

Illness Indemnities.

Part J.

Confining Illness Two Hundred Dollars Per Month for Life.

The Association will pay, for one day or more, at the rate of One Hundred ($100.00) Dollars per month the first fifteen days and at the rate of Two Hundred ($200.00) Dollars per month thereafter for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physican; provided said disease necessitates total disability and total loss of time.

Part K.

Non-Confining Illness One Hundred Dollars Per Month.

The Association will pay, for one day or more, at the rate of One Hundred ($100.00) Dollars per month, but not exceeding one month, for disability resulting from disease, the cause which originates more than thirty days after the date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

Part L.

Additional Benefits if Confined to Hospital.

If the Insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expense, but not exceeding One Hundred Fifty ($150.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

Standard Provisions.

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the Insured,

shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

13. Consent of the beneficiary shall not be requisite t surrender or assignment of this policy, or to change beneficiary, or to any other changes in the policy.

14. No action at law or in equity shall be brought t recover on this policy prior to the expiration of sixt days after proof of loss has been filed in accordance wit the requirements of this policy, nor shall such action b brought at all unless brought within two years from th expiration of the time within which proof of loss is re quired by the policy.

15. If any time limitation of this policy with respect t giving notice of claim or furnishing proof of loss is les than that permitted by the law of the state in which th Insured resides at the time this policy is issued, suc limitation is hereby extended to agree with the minimu period permitted by such law.

Additional Provisions.

(a) This policy does not cover death, disability, o other loss sustained in any part of the world except th United States and Canada, or while engaged in militar or naval service, or while the Insured is not continuousl under the professional care and regular attendance, a least once a week, beginning with the first treatment, o a licensed physician or surgeon, other than himself; o received because of or while participating in aeronautics except as provided in Part I; or resulting from insanity or disability from any disease of organs which are no common to both sexes.

(b) Strict compliance on the part of the Insured an beneficiary with all the provisions and agreements of thi policy, and the application signed by the Insured, is condition precedent to recovery, and any failure in thi respect shall forfeit to the Association all right to an indemnity.

(c) The copy of the application endorsed herein is here by made a part of this contract and this policy is issue in consideration of the statements made by the Insured i the application and the payment in advance of Twenty seven ($27.00) Dollars as first payment; and the payment in advance of premiums of Seventeen ($17.00) Dollars quarterly or Sixty-eight ($68.00) Dollars annually there after, beginning with April 1, 1932, is required to keep this policy in continuous effect. If any such dues be un-

paid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the Insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon, Standard Time, on date of delivery to and acceptance by the Insured against accident and on the thirty-first day thereafter against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The maximum liability of the Association under this policy shall be the largest amount stated herein.

(g) The Annual Meeting of the Association will be held at ten o'clock A. M. on the second Saturday after the first day of February, at the Home Office of the Association.

IN WITNESS WHEREOF, Mutual Benefit Health & Accident Association has caused this policy to be signed by its President and its Treasurer, and dated this 10th day of December, 1931, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

A. I. Welles,
President.

C. C. Criss,
Treasurer.

Countersigned by
E. C. Balis,
Policy Clerk.

Waiver of Premium.

When claim for permanent total disability of the Insured, due to bodily injuries or sickness covered by this policy, has been filed and approved while this policy is in force, there will be no further premium payable, but the Insured will draw benefits as provided in the policy.

In Witness Whereof, Mutual Benefit Health & Accident Association has caused this endorsement to be signed by its President and its Vice-President.

C. C. Criss,
President.

F. W. Engler,
Vice-President.

Series 727.

Non-Cancellable Endorsement.

The Association cannot cancel this policy for any period for which the premium has been paid.

In Witness Whereof, Mutual Benefit Health & Accident Association has caused this endorsement to be signed by its President and its Treasurer.

A. I. Welles,
President.

C. C. Criss,
Treasurer.

Series 1125.

Copy of Application.

1. What is your full name? Paul Miccolis.

2. What is your age? 48. Sex? Male. Date of Birth? Febr. 1883.
   Place of birth? Italy, (State) .....
   Height? 5 feet 10 inches. Weight? 205 Pounds.

3. What is your residence address? 1900 West 8th Avenue.
   Town of Gary, State of Indiana.
   Address to which premium notices are to be sent Same as above.

4. Whom do you name as beneficiary? Name Antonio P. Miccolis. Address Same.
   What is the relationship of the beneficiary to you? Wife.

5. Are you member of firm or employee? Member of firm.
Name of firm? Italian Food Products Co.
Nature of business? Grocery and meat market.
Location of firm? 1238 Broadway.
Town of Gary, State of Indiana.

6. What is your occupation? Proprietor.

7. What are all of your duties connected therewith? Office duties only.

8. What accident or health insurance do you carry? Give names of all companies or associations and amounts none.
Have you any application for life, accident or health insurance pending? Answer as to each No.

9. Has any application ever made by you for life, accident or health insurance been declined? Answer as to each no.
Has any life, health or accident policy issued to you been cancelled? Answer as to each no.
Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each no. If so, give full particulars

10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes no.

11. Are you sound physically and mentally? Answer as to each yes. Are you maimed or deformed? Answer as to each no.
Have you any impairment of sight or hearing? Answer as to each no. Have you ever had a hernia? no.
Are your habits correct and temperate? yes.

12. Have you ever had any of the following diseases: Rheumatism? No. Epilepsy? no. Diabetes? no.
Heart Disease? no. Have you or any member of your family ever had Tuberculosis? no.
Any disease of the brain or nervous system? no.

13. Have you received medical or surgical advice or treatment or had any local or constitutional disease within the past five years? Answer as to each from colds once in a while.

In (Year) ..... for (Nature of Disease) .....
lasting (State Duration) .....
In ..... for ..... lasting .....

14. Have you ever been operated on by a physician or surgeon? no. Date .....
For ..... Result .....

15. Do your average monthly earnings exceed the monthly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? yes. What are your average monthly earnings? $800.

16. What is the form number of policy applied for? 68V. What is the premium? $27.00 initial & $17.00 quarterly.

17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the Insured while in good health and free from injury? yes.

18. Do you hereby apply to the Mutual Benefit Health & Accident Association for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association, and do you agree to notify the Association promptly of any change in your occupation, or if you take additional insurance, and do you hereby authorize any physician or other person who has attended or may attend you to disclose any information thus acquired? yes.

Dated at Gary, Indiana, this 7th day of December, 1931.

(Signature of applicant) Paul Miccolis.

(Burns Ind. Stat. 1933, Old Vol. 8, Sec. 39-801.)

STANDARD POLICY FOR LIFE INSURANCE.

Provisions of Life Insurance Policies.—From and after July 1, 1909, no policy of life insurance shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall provide the following:

(1) That all premiums shall be payable in advance, either at the home office of the company, or to an agent of the company, upon delivery of a receipt signed by one (1) or more of the officers who shall be designated in the policy.

(2) For a grace of not less than thirty (30) days for the payment of every premium after the first year, which may be subject to an interest charge, during which period the insurance shall continue in force: Provided, That if the insured shall die within such period of grace, the unpaid premium for the current policy year may be deducted in any settlement under the policy.

(3) That the policy, together with the application therefor, a copy of which application shall be attached to the policy and made a part thereof, shall constitute the entire contract between the parties and shall be incontestable after it shall have been in force during the lifetime of the insured for two (2) years from its date, except for nonpayment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war.

(4) That if the age of the insured has been misstated, the amount payable under the policy shall be such as the premium would have purchased at the correct age of the insured.

(5) That all statements made by the insured in the application shall, in the absence of fraud, be deemed representations and not warranties.

(6) That the policy shall participate in the surplus of the company as apportioned by the board of directors of the company, and that, beginning not later than the end of the fifth policy year, the company will determine and account for the portion of the divisible surplus so ascertained accruing on the policy, and that the owner of the

policy shall have the right to have the current dividends arising from such participation paid in cash, and that at periods of not more than five (5) years, such accounting and payment at the option of the policyholder shall be had. The owner of the policy may elect to take any of the other dividend options in the policy. If the owner of the policy shall not elect any of the other dividend options provided in the policy, the apportioned dividends shall be held to the credit of the policy and be payable in cash at maturity of the policy or be withdrawable in cash at any anniversary of its date: Provided, however, If the policy shall contain a provision for an apportionment of the surplus at the end of the first policy year, and annually thereafter, then in that event, said policy may provide that each dividend shall be paid subject to the payment of the premium of the next ensuing year. This provision shall not be required in non-participating policies.

(7) A table showing in figures the loan values and the cash, paid-up and extended insurance options upon surrender, or available under the policy each year, upon default in premium payment, during at least the first twenty (20) years of the policy, beginning not later than the end of the third policy year, which values shall be equal to the full reserve on the policy, less not to exceed two and one-half (2½) per cent of the sum insured; following this table there shall be a clause specifying the mortality table and rate of interest adopted for computing the reserve and specifying the basis for the values and options after the period covered by the table. This provision shall not apply to term policies nor to any form of paid-up insurance issued or granted in exchange for lapsed or surrendered policies.

(8) Policies issued by companies doing business in this state may provide for not more than one (1) year preliminary term insurance by incorporation therein (of) the following clause immediately following the table of options and statement of basis therefor: "The first year's insurance under this policy is term insurance, purchased by the whole or part of the premium to be received during the first policy year and the policy shall be valued according to its terms and the laws of the state of Indiana."

(9) That after three (3) full years' premiums shall have been paid, the company, at any time, while the policy is in force, will loan, on the execution of a proper assignment of the policy, and on the sole security thereof, at a specified rate of interest, a sum equal to, or at the option of the

insured, less than the amount stated in the table of options to be loaned at the end of the current policy year plus the value of the reserve on any dividend additions to the policy, and that the company will deduct from such loan value any existing indebtedness on or secured by the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year; and may further provide that such loan may be deferred for not exceeding six (6) months after the application therefor is made. It shall be further stipulated in the policy that failure to repay any such loan or pay interest thereon shall not void the policy unless such total indebtedness to the company shall equal or exceed such loan value at the time of such failure, nor until thirty (30) days after notice shall have been mailed by company to the last known address of the insured and to the assignee, if any, if such assignee has notified the company of his address. No condition other than as herein provided shall be exacted as a prerequisite to any such loan. This provision shall not be required in term policies nor shall it apply to paid-up insurance issued or granted in exchange for lapsed or surrendered policies.

(10) That in the event of default of premium payment after premiums have been paid for not less than three (3) years, the insured shall be entitled to the extended insurance shown in the table of values and options for the end of the last year for which full annual premiums shall have been paid: Provided, That if there be any unpaid note given for a premium or any indebtedness to the company on account of or secured by the policy, the amount of extended insurance shall be reduced in the ratio of such indebtedness to the net value of such extended insurance; or, the amount of such indebtedness shall be deducted from the net value of the extended insurance otherwise available and the balance shall be applied as a net single premium to purchase extended insurance for an amount equal either to the face of the policy or to the face of the policy less the amount of such indebtedness; And, provided, That the policy may be surrendered to the company at its home office within one (1) month from the due date of the unpaid premium for a specified cash value at least equal to the sum which would otherwise be available for the purchase of extended insurance as aforesaid; And, provided, further, That the company may defer payment for not more than six (6) months after the application therefor is made.

This provision shall not be required in term insurance of twenty (20) years or less.

(11) That, should there have been default in premium payment, and the value of the policy applied to the extension of the insurance, and such insurance be in force and the original policy not surrendered to the company and canceled, the policy may be reinstated within three (3) years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest.

(12) That when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and of the interest of the claimant and not later than two (2) months after receipt of such proof.

(13) A title on the face and on the back of the policy describing the same.

Any of the foregoing provisions or portions thereof relating to premiums not applicable to single premium policies shall to that extent not be incorporated therein. The foregoing provisions of this section five (5) shall not apply to policies issued on substandard, under average or impaired risks. (Acts 1909, ch. 95, § 5, p. 247; 1925, ch. 195, § 1, p. 466.)

Sec. 39-4306, New Vol. 8, Burns R. S. 1933.

(STANDARD PROVISIONS—HEALTH AND ACCIDENT POLICIES.)

(a) On and after the first day of July, 1935, no policy of insurance against loss or damage from sickness, or the bodily injury or death of the insured by accident, shall be issued or delivered to any person in this state by any domestic company, or, any foreign or alien company authorized to do business in this state, until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the department; nor shall it be so issued or delivered until the expiration of thirty (30) days after it has been so filed unless the department shall sooner give its written approval thereto. * * *

* * * * * *

(c) Every such policy so issued shall contain certain standard provisions, which shall be in the words and in the

order hereinafter set forth and be preceded in every policy by the caption "Standard Provisions." In each such standard provisions wherever the word "insurer" is used there shall be substituted therefor "company" or "corporation" or "association" or "society" or such other word as will properly designate the insurer. Said standard provisions shall be:

* * * * * *

(A): 1. This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

(B): 1. This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the insurer's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the insurer as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the insurer will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the insurer for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the insurer in accordance with such law, but if such filing is not required by such law, then they shall mean the insurer's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the insurer is liable.

(2) A standard provision relative to changes in the contract, which shall be in the following form:

2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy, or waive any of its provisions. No

change in this policy shall be valid unless approved by an executive officer of the insurer and such approval be indorsed hereon.

* * * * * *

(11) A standard provision relative to indemnity payments which may be in either of the two (2) following forms: Form (A) to be used in policies which designate a beneficiary and form (B) to be used in policies which do not designate any beneficiary other than the insured.

(A): 11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

(B): 11. All the indemnities of this policy are payable to the insured.

* * * * * *

(13) A standard provision relative to the rights of the beneficiary under the policy which shall be in the following form and which may be omitted from any policy not designating a beneficiary:

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

* * * * * *

(1) An optional standard provision relative to cancelation of the policy at the instance of the insurer as follows:

16. The insurer may cancel this policy at any time by written notice delivered to the insured or mailed to his last address, as shown by the records of the insurer, together with cash or the insurer's check for the unearned portion of the premiums actually paid by the insured, and such cancelation shall be without prejudice to any claim originating prior thereto.

* * * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 643

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A NEBRASKA CORPORATION,
Petitioner,

vs.

ANTONIA P. MICCOLIS,
Respondent.

PETITIONER'S REPLY BRIEF ON ITS PETITION FOR WRIT OF CERTIORARI.

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Petitioner,

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ANTONIA P. MICCOLIS,

Respondent.

PETITIONER'S REPLY BRIEF ON ITS PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Respondent resists the petition upon three grounds:

A. That petitioner is attempting to present its Point A (petition and brief p. 7) for the first time in this Court;

B. That under the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, this Court is not here concerned with conflicts among the various Circuit Courts of Appeal;

C. That the instruction complained of by petitioner (Brief Point C, p. 17) was more favorable than petitioner had a right to ask.

Petitioner wishes briefly to reply to these contentions.

A.

In view of the record, it is not understood why respondent says that petitioner's point on incontestability was not made in the Court of Appeals. (p. 5) The District Court held the statute inapplicable (R. 195: where plaintiff's request for instructions was refused). Therefore, the question was not presented to the Circuit Court of Appeals in petitioner's original brief. Petitioner had won that point in the district court. The point was made on appeal for the first time in respondent's answer brief. Thereupon petitioner replied and attempted to meet the contentions of respondent. It presented the question again on rehearing. While the language in the reply brief and that of the petition for rehearing was not in all respects the same, the fact remains and cannot be disputed that the point here presented is the identical point presented to the Circuit Court of Appeals (R. 256). This point may be stated simply and briefly: this policy was not rendered incontestable by the incontestability clause of the life insurance statute of Indiana. Respondent took the contrary view and in support of it argued that because the claim was for death benefits, the policy became a life policy. The ultimate question here is not of the title, style or denomination given the policy, but whether it is an incontestable contract, made so by statute.

The Circuit Court of Appeals could not escape an answer to this question either when it considered the reply brief (pp. 4, 8-15), or passed on the petition for rehearing.

On petition for rehearing the point was further elaborated on, and an additional authority cited, which, far from being intentionally withheld from the Court as charged in respondent's brief (p. 4), was called forth for the first time because the Circuit Court of Appeals held that this was a life policy. This additional authority (*Western Life Indemnity Co.* v. *Bartlett*, 84 Ind. App. 589) holds that even

life policies are divided into two groups, the ordinary level premium, and the assessment type, to the latter of which the incontestability clause of the statute has no application.

Certainly it must be said that both by the reply brief and the petition for rehearing the Circuit Court of Appeals had this question before it from every standpoint. It had the case for all purposes until it passed on the petition for rehearing (R. 259).

No authority has been cited by respondent, and none has been found by petitioner, holding that a petitioner for writ of certiorari may not rely upon an authority cited to the Circuit Court of Appeals for the first time in a reply brief or on petition for rehearing. Probably no counsel appearing for a respondent in this Court has ever thought to offer such an unsubstantial objection to the allowance of a writ. Even in the present case respondent makes the point in extremely general terms, without elaboration or citation of authority.

It is believed that the learned counsel for respondent has failed to distinguish between a point made and reasons given in support of it. The discussion of the question has not always been in the same language, but the question itself has not varied.

The principle, if there be one, invoked by respondent, is contrary to that applied by this Court in the *Agee* case (268 U. S. 687), wherein Your Honors granted certiorari but revoked it (269 U. S. 551) because of the intervening decision of *Carter* v. *Standard Accident & Insurance Company* by the Supreme Court of Utah. This Court recognized an additional authority after certiorari had been granted.

Respondent's position is equivalent to a denial of the right of a party to offer additional authorities at any stage of the proceedings, a contention which is highly technical and not, so far as we know, encouraged by courts of review.

Points B and C.

Points B and C of respondent's brief seem to call for no further discussion than that already embodied in the brief supporting the petition.

L. L. Bomberger,
John W. Morthland,

ARTHUR F DRURY

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 643

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A NEBRASKA CORPORATION,
Petitioner,

vs.

ANTONIA P. MICCOLIS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CASES AND STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

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Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was written by Circuit Judge Evan A. Evans. It was filed on October 28, 1940, and appears on page 232 of the record. It has not as yet been published in any of the official reports.

Jurisdiction.

Under Sec. 240 (a) U. S. C. A. 347, this court has jurisdiction to grant the writ of certiorari in a proper case.

Statement of the Case.

The statement of the case contained in the petition under the heading, "Matters Involved," is substantially correct except in so far as said statement says:

> "Whereas he was active as a member of a ring engaged in illicit liquor traffic, in which his sales of sugar and yeast for a given period amounted to more than ten times the legitimate sales of his grocery store. He was prosecuted by the United States and by the State of Indiana, and convicted and punished for conspiracy and other violations of the National Prohibition Laws. These defenses were proved without dispute."

The respondent says that there was no evidence that he was a member of a ring engaged in illicit liquor traffic; there was evidence that he sold considerable sugar and yeast to manufacturers of illicit liquor; that ten years before his application for insurance he had been indicted and convicted for conspiracy to violate the National Prohibition Act and was given a sentence of four months imprisonment; that in 1933 after the policy in this case was issued and in force, he was indicted, plead *nolle contendere* and was fined. There were no other convictions of the National Prohibition Laws.

Respondent also says that there was no evidence that the petitioner retendered premiums upon discovery of the falsity of the statements in the application. There is some evidence, which, if believed, indicates that a check was offered to respondent as a tender back of premiums, or in settlement of the policy, but respondent says that this is not a tender under the Indiana law.

In other particulars the statement of the matters involved is substantially correct.

Questions Presented.

I.

The questions presented are substantially such as were presented to the Circuit Court of Appeals with the exception of the first question which entirely omitted the proposition that petitioner's policy was issued on the assessment plan and that the statute was inapplicable to insurance issued on the assessment plan. Petitioner's proposition of law relied on in the Circuit Court of Appeals as contained in its brief in presenting that question to the Circuit Court of Appeals is as follows:

> "A. To meet plaintiff's contention that this is a life insurance policy:
>
> "1. The policy was not a life policy with disability benefits attached thereto, but a policy of accident insurance covering both disability and death by accident. The only point in common between this policy and a life policy is that the latter covers death at all events, while the former covers accidental deaths only, as well as disability caused by accident.
>
> *United Commercial Travelers* v. *Edwards*, 10 C. C. A., 51 Fed. (2d) 187.
>
> *Jones* v. *Prudential Ins. Co.*, (Mo. Sup.) 263 S. W. 429.
>
> *Standard Life & Acc. Ins. Co.* v. *Carroll*, 3 C. C. A., 86 Fed. 567.
>
> *Mutual Reserve Life* v. *Dobler*, 9 C. C. A., 137 Fed. 550.
>
> *Fidelity & Casualty Co. of N. Y.* v. *Dorough*, 5 C. C. A., 107 Fed. 389.
>
> *Baumann* v. *Preferred Acc. Ins. Co.*, 225 N. Y. 480; 122 N. E. 628.
>
> *Arneberg* v. *Continental Cas. Co.*, 178 Wisc. 428; 190 N. W. 97; 29 A. L. R. 93.

Metropolitan Life Ins. Co. v. *Hardison,* (Mass.) 94 N. E. 477.

Flannagan v. *Provident Life Ins. Co.,* 4 C. C. A., 22 Fed. (2) 136-140.

"2. The Indiana statutes in force when this policy was issued provided for the licensing of foreign life insurance companies (Burns R. S. 1933, Sec. 39-236). They also provided for the licensing of a foreign assessment association doing life *or* accident business (Burns R. S. 1933, Sec. 39-415).

"3. The life insurance statute requires many provisions in a life policy which are obviously not applicable to accident policies, such as extended insurance, cash or paid-up values, grace period, a clause making policies incontestable after two years, etc. (Burns R. S. 1933, Sec. 39-801). The decisions recognize the difference between life insurance policies as such and a policy of accident insurance.

United Commercial Travelers v. *Edwards,* 10 C. C. A., 51 Fed. (2) 187-190.

"4. The three-year limitation provision of Burns R. S. 1933, Sec. 39-1713, applies to all foreign companies, whether life, accident, casualty, fire, plate glass, or whatever; hence, reference to it in the policy in question is no indication of a concession that it is a policy of life insurance."

Respondent believes that petitioner intentionally did not present this question to the Circuit Court of Appeals because it was relying on a line of decisions by the Supreme Court of Indiana, to-wit: *Metropolitan Life Ins. Co.* v. *Becraft,* (1938) 213 Ind. 378, 383; *Rushville National Bank, Trustee,* v. *State Life Ins. Co.* (1936) 210 Ind. 492, 505; *New York Life Ins. Co.* v. *Kulenschmidt,* 213 Ind. 212, 220; and *Metropolitan Life Ins. Co.* v. *Alterovitz,* 214 Ind. 186; 14 N. E. (2d) 570, based upon Burns Ann. Stat. 1933, sec. 39-801, #3; where in the Indiana Supreme Court overruled a long line of decisions based upon that part of the statute which provides:

"The policy, together with the application therefor,

> a copy of which application shall be attached to the policy and made a part thereof, shall constitute the entire contract between the parties." (See especially, *Metropolitan Life Ins. Co.* v. *Alterovitz*, 214 Ind. 186.)

The balance of the section which is relied on by the respondent provides:

> "and shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for non-payment of premiums. * * *" (See Petitioner's Brief, pg. 33, subd. 3.)

II.

Under petitioner's second question presented, respondent contends that the tendered instruction was incorrect because it failed to take into consideration the waiver of petitioner of its right to claim a forfeiture of the policy and its assumption that the facts had been proven beyond dispute, establishing the right to claim a forfeiture or cancellation. The instruction also assumes that the tender of a draft is a tender of the return of premiums which is in direct conflict with the Indiana decisions.

Summary of Argument.

A.

The proposition of law attempted to be presented by the petitioner to this court was not presented to the Circuit Court of Appeals and, therefore, cannot form the basis for petition for writ of certiorari to this court.

B.

Petitioner's Point B is no longer available since the decision of this court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 overruling *Swift* v. *Tyson*, 16 Peters 1, 10 L. Ed. 865.

C.

Petitioner's tendered instruction to the trial court was wrong in that it omitted certain elements necessary for a directed verdict and assumed the proof of facts in dispute whereas the instruction as modified by the court stated the law much more favorably to petitioner than petitioner was entitled to.

ARGUMENT.

A.

The Circuit Court of Appeals Did Not Decide a Question of Local Law in Such a Way as to Probably Contravene a Local Decision or a Decision of This Court.

Respondent contends that the Circuit Court of Appeals did not erroneously decide a question of local law which contravened a local decision for the reason that such question was never presented to the Circuit Court of Appeals.

Petitioner for the purpose of taking advantage of the statute of Indiana, Burns 1933, Sec. 39-801 (3) presented to the Circuit Court of Appeals only one question and that was whether the policy sued upon was a life insurance policy or an accident insurance policy. For the purpose of indicating what question was presented to the Circuit Court of Appeals, we have set out that part of petitioner's brief in the Circuit Court of Appeals dealing with that question. We believe that this was done by the petitioner for the purpose of taking advantage of the first part of Burns 1933, Sec. 39-801 (3) which provided:

> "That the policy, together with the application therefor, a copy of which application shall be attached to the policy and made a part thereof, shall constitute the entire contract between the parties."

Under that provision of the statute the Supreme Court of Indiana overruled a long line of decisions which held that the answers to questions in an application for insurance need only be substantially true, and that the policy cannot be avoided if the applicant had made correct answers to the agent taking the application. In *Metropolitan Life Ins. Co.* v. *Alterovitz,* 214 Ind. 186; 14 N. E. (2d) 570, the Su-

preme Court of Indiana in holding that a policy may be avoided on account of incorrect answers in the application based its opinion on the statute in saying:

> "After the enactment of that statute, the case of *Sternaman* v. *Metropolitan Life Ins. Co.*, 170 N. Y. 13; 62 N. E. 763; 57 L. R. A. 318, and others to the same effect, ceased to be authority upon the question in an action upon a life insurance policy issued by a 'life insurance corporation doing business within the state,' when a copy of the application was indorsed upon or attached to the policy. The statutory rule superseded the court-made rule."

The court further said:

> "We are mindful of the fact that there are opinions of this court long prior to the adoption of the law of 1909 which seem to be contrary to this opinion. We refer especially to cases of *Michigan Mutual Life Insurance Co.* v. *Leon*, 138 Ind. 636, 37 N. E. 584, and *Germania Life Insurance Co. of New York*, v. *Lukenheimer*, 127 Ind. 536, 26 N. E. 1082. Conceding the law announced in these opinions, and others of this court of like import, were correct in principle, they are no longer controlling in view of the act of 1909, *supra*."

It will thus be seen that the Supreme Court of Indiana based its opinion upon the statute and it is respondent's belief that the petitioner attempted to take advantage of that part of the statute and for that reason made no contention in the Circuit Court of Appeals that the petitioning company was an assessment company. It based its entire reliance upon the proposition that the contract of insurance was a contract of accident insurance and consequently the statute did not apply.

On the question submitted to the Circuit Court of Appeals the respondent contends that the law is as stated in *Guardian Life Ins. Co. of America* v. *Barry*, 213 Ind. 56; 10 N. E. (2d) 614; and in *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489. The policy in the *Guardian Life Ins. Co. of America* v. *Barry* was a policy insuring the life of the insured against death in all events and containing also disability benefits.

The insured suffered a disability and sought to recover. The company answered that the insured had obtained the policy through fraudulent representations. The insured replied that the policy had become incontestable in that it had been in effect for more than two years. The Supreme Court held that:

> "In all of the cases which have come to our attention, dealing with statutes of the character here involved (incontestability statutes) it has been held that a combination of life and disability policies is to be regarded as two distinct contracts, though contained in one instrument, and that statutory provisions for an incontestability clause for life insurance policies is inapplicable to the disability insurance."

The court also says in this case:

> "But there are other statutes authorizing the organization of insurance companies. Burns' Ann. St. 1933, Sec. 39-101 *et seq.*, authorizes the organization of companies to issue policies of insurance upon 'vessels, freight, money, goods and effects, on the life or health of any person' (Burns' Ann. St. 1933, Sec. 39-120), and against loss by fire, *et cetera.* It would seem that it was the legislative intention to deal with all policies of life insurance rather than with the policies of life insurance companies organized under the particular statute. * * * It is therefore but reasonable to conclude that public interest was thought to require that policies upon the life of persons should be protected, and that no necessity was seen for a like protection in the case of policies insuring against disability. The insurance contract in question is severable, and, while it insures the life of appellee, it insures him against permanent disability for a separate and distinct consideration."

And in a case decided by this court, *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, this court held that in a policy of insurance which was issued to one James Whitfield and which provided indemnities in case of certain injuries and further provided:

> "If death results solely from such injuries within ninety days, the said Company will pay the principal sum of five thousand dollars to (the beneficiary) if living; and to (the personal representative) if dead."

The insured died as the result of:

> "bodily injuries, effected through external, violent, and accidental means, and by a pistol shot."

This court after considering the case fully held that the policy was a life insurance policy which under the Missouri statute excluded the defense of suicide. In other words, that the policy could not be contested for suicide. We believe, therefore, that the opinion of the Circuit Court of Appeals is not contravened by any local decision in the State of Indiana, but is supported by local decisions and by the decisions of this court. We might say in passing that the only case relied on by petitioner, to-wit: *Western Life Indem. Co.* v. *Bartlett*, 84 Ind. App. 589, was not presented to the Circuit Court of Appeals in petitioner's brief on appeal or in petitioner's reply brief. Neither was any mention made of Acts of 1937, Burns' Rev. Stat. 1933, old vol. 8, Sec. 39-430, upon both of which petitioner relies in its petition herein, and respondent believes that a question which was not presented to the Circuit Court of Appeals on appeal cannot form the basis of petition for writ of certiorari; the petitioner cannot take advantage of invited error.

B.

Whether or Not the Decision of the Circuit Court of Appeals Construed the Indiana Statute Differently Than Similar Statutes Were Construed by Other Circuit Courts of Appeals Is Immaterial.

We do not believe that Point B has any further significance in view of the decided cases by the Supreme Court of the State of Indiana, and the decision of this court in *Tompkins* v. *Erie Railroad* overruling *Swift* v. *Tyson* and other cases of like import. The fact that other Circuit Courts of Appeals may have construed similar cases differently than the Circuit Court of Appeals construed the

statute in the instant case, is without force when the decision of the Circuit Court of Appeals is in line with the decisions of the Supreme Court of Indiana, and this court.

C.

The Instruction as Given by the District Court Is More Favorable to Petitioner Than It Was Entitled to and Consequently Cannot Form the Basis for a Writ of Certiorari.

In regard to Point C, the respondent says that the correctness of answers in an application for insurance may be waived and they are waived by the failure of the insurer to take steps to avoid the policy upon learning of the incorrectness of the answers. These steps include: (1) Action by the company to avoid the policy; (2) Notice to the insured, if living, and to the beneficiary, if dead; (3) A tender back of the premiums paid. *Commercial Life Ins. Co.* v. *Schroyer,* 176 Ind. 654; 95 N. E. 1004. We also believe that when the question of the materiality of the answers is submitted to the jury upon proper instructions, that the jury determines and is required to determine whether the representations are of such a character as to materially affect the risk. In *New York Life Ins. Co.* v. *Skinner,* 214 Ind. 384; 14 N. E. (2d) 566, the Supreme Court of Indiana said:

> "Appellant's instructions * * * tendered and refused, are all open to the same objections. Each of them undertook to advise the jury that, if they found that certain representations made by the insured in his application were untrue, then such representations were 'material to the risk.' These instructions were improper as invading the province of the jury. It was for the jury to say whether, under all the circumstances, the representations were of such a character as to materially affect the risk assumed by the appellant when it issued the policy of insurance sued on. There was no error in refusing these instructions."

This case was decided in 1938 and on the day following the case of *Metropolitan Life Ins. Co.* v. *Alterovitz,* and consequently is the last word of the Supreme Court of Indiana on this proposition. Consequently even though the statement in the application for insurance may have been incorrect, it is for the jury to say whether the representations were such as to materially affect the risk.

On the question of tender, respondent's position is that this was decided by the jury against the petitioner and while it is true that the court did not give the instruction to the jury as the petitioner tendered it, the instruction as modified by the court nevertheless states the law more favorable than the petitioner was entitled to have it stated. The jury had a right to find whether the actions of the insurer were such that they waived the correctness of the answers in the application for insurance, and whether the answers, if incorrect, materially affected the risk. They had a right to determine whether insured's conviction ten years prior to his application for insurance in which he received a sentence of four months' imprisonment was of such a nature as to materially affect a risk. They had a right to determine whether his sale of sugar and yeast to persons engaged in the illicit liquor traffic was of such a character as to materially affect the risk. They also had a right to determine whether or not a tender had been made, the evidence on this being conflicting. Under such circumstances the instruction given by the court was not harmful to the petitioner; in fact, it was more favorable than the petitioner had a right to expect. According to the decisions in Indiana, the tender of a check is not legal tender and consequently does not amount to a tender back of premium *United States Ins. Co.* v. *Clark,* 41 Ind. App. 345, 83 N. E. 760; *State Life Ins. Co.* v. *Pletcher,* 78 Ind. App. 128, 134 N. E. 876; and furthermore, the person to whom the money is tendered need not make any specific objections to either the

nature, medium or amount of the tender. *Sofnas* v. *John Hancock Life Ins. Co.*, ... Ind. App. ....., 21 N. E. (2d) 425. This last case was decided in 1939 so that the instruction as given by the court is much more favorable to petitioner than the petitioner had a right to expect.

Since the petition does not present a case in which the opinion of the Circuit Court of Appeals has decided an important question of local law a way probably conflicting with the local decisions, but that the decision on the question presented to it is in conformity with the decisions of the Supreme Court of Indiana, and of this court, and since the instruction given by the trial court; which the Circuit Court of Appeals did not pass upon in view of its decision upon the other question; respondent contends that the petition does not present any question which should be considered by this court on a writ of certiorari. Respondent, therefore, respectfully submits that the petition for writ of certiorari be denied and that the judgment of the Circuit Court of Appeals of the Seventh Judicial Circuit be in all things affirmed.

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